Supreme Court, U. S.
FILED
JUN 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Petitioner,*

*v.*

MICHAEL MUSANTE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

_____

No.

_____

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

MICHAEL MUSANTE

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

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Petitioner, the People of the State of California respectfully requests a writ of certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Two, which was entered on March 11, 1980, and became final on April 24, 1980. (Cal. Rules of Court, rule 24a.)

## OPINION BELOW

The opinion of the Court of Appeal may be found at 102 Cal.App.3d 156, ___ Cal.Rptr. ___. A copy of the opinion appears as Appendix A to this petition.

## JURISDICTION

The judgment of the Court of Appeal of California became final on April 24, 1980. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

## QUESTIONS PRESENTED

1. Whether a thief of an automobile has an expectation of privacy in closed containers in the automobile so that police must obtain a search warrant to search closed containers within the automobile.

2. Whether the rule in Arkansas v. Sanders (1979) 442 U.S. 753, should be applied to the search in this case which occurred in 1977.

3. Whether the exclusionary rule should be modified or abolished as its deterrent effect is questionable and it does not foster public belief in the integrity of the judicial system.

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized."

## STATEMENT OF THE CASE

### A. History of the Case

A complaint filed in the Municipal Court of San Bernardino County charged respondent Michael Musante with burglary (Pen. Code, § 459) in case F-1114. (CT 6.)1/ On January 27, 1978, an information was filed in CR 34522 charging respondent in count I with receiving stolen property (Pen. Code, § 496), in count II with possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (a)), in count III with transportation of marijuana (Health & Saf. Code, § 11360), and in count IV with taking or driving the vehicle of another (Veh. Code, § 10851).

On February 6, 1978, respondent entered a guilty plea in the municipal court to the burglary charge in F-1114. (CT 11-18.) On March 31, 1978, respondent's motions to suppress evidence pursuant to Penal Code section 1538.5 and to dismiss the information pursuant to Penal Code section 995 were heard and denied in case CR 34522. (CT 23.)

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1. CT refers to the clerk's transcript of the proceedings in the superior court.

On April 7, 1978, respondent entered a guilty plea to the charge in count II of the information in case CR 34522. As part of the bargain the remaining counts in the information were to be dismissed. (CT 27-28.)

On May 22, 1978, a motion to withdraw the guilty plea to the burglary charge in F-1114 was heard and denied. (RT 5/22/78.)2/

On June 5, 1978, respondent was sentenced to state prison for three years on the burglary charge in case F-1114. He was also sentenced to state prison for 24 months as to the marijuana case. However, 16 months were to be stayed so respondent would only serve a consecutive term of 8 months as to that charge. (CT 47-51.)

He appealed from the judgments. (CT 52-53.)

In a published opinion issued on February 14, 1980, the California Court of Appeal, Fourth Appellate District, Division Two, reversed the conviction on the possession of marijuana for sale charge (CR 34522) on the ground the seizure of the marijuana was improper. (Appen. A.)

Petitioner, the People of the State of California sought a hearing

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2. RT refers to reporter's transcript of the proceedings in the superior court.

before the California Supreme Court, but the request for a hearing was denied on April 24, 1980. (Appen. B.)

The Court of Appeal and this Court have refused to stay enforcement of the judgment. (Appen. C.)

B. Statement of Facts

1. The Burglary Charge

Respondent's conviction on the burglary charge rested upon his guilty plea to the charge that he unlawfully entered a dwelling belonging to an Escol Moses in Lucerne Valley, California, with the intent to commit theft. (CT 6.)

2. The Possession of Marijuana for Sale Charge

On November 12, 1977, at about 1:25 a.m., Deputy Richard Crocker of the San Bernardino County Sheriff's Office, noted a car weaving slightly and moving to the shoulder. After observing the car weave, he followed it. Thereafter, the vehicle went through an intersection at a very slow speed and almost stopped at a green light. The car continued onto the freeway and continued to weave slightly. He then stopped the vehicle, spoke to the driver, checked her license, and administered a field sobriety test. However, he could not tell from her performance whether she was under the influence. Lacking the expertise to conclusively determine the issue, he called to the Highway Patrol for assistance.

(Preliminary Hg. Transcript, pp. 26-36.)

About 15 minutes later, Officers Stevens and Hernandez of the Highway Patrol arrived. Stevens contacted Musante, a passenger in the vehicle, while Hernandez administered a sobriety test to the driver. Stevens asked Musante whose car it was and Musante indicated it belonged to the driver and him as they were married. Musante then removed the registration from the car and showed it to the officer. When the officer noted the VIN number on the registration did not match the VIN number of the car, he ran a registration check. While he waited for a response, Hernandez told him the driver was not under the influence. During this time Musante and the driver gave conflicting stories with regard to ownership of the vehicle. The registration check eventually indicated the car had been stolen in Sonora, California, on October 25, 1977. Musante and the driver, a Miss Caston, were then arrested.

While the contents of the vehicle were being inventoried, an electric blanket box was found in the rear seat of the vehicle. The box was opened and marijuana was found inside. The box had been taped shut. (Preliminary Hg. Transcript, pp. 41-55, 72-74.)

## REASONS FOR GRANTING THE WRIT

This case presents a fundamental question regarding application of the exclusionary rule: whether an automobile thief may assert a legitimate right to privacy as to closed containers in the stolen car.

The State of California believes an analysis of the contrasting privacy expectations of the owner and the thief of an automobile indicate it is reasonable for the police to conduct a warrantless search of closed containers in a stolen vehicle. A thief should know the inevitable capture of the car will involve a search to determine ownership and an inspection of any containers in the car to determine their ownership.

This case is of nationwide importance as it involves the extent to which a thief may hide behind the shield of the exclusionary rule and use it as a sword to prevent proper police investigation. It also raises fundamental questions as to whether our legal system can recognize the right of a thief to assert a legitimate expectation of privacy in items contained inside a vehicle the thief has stolen.

## ARGUMENT

### I

### THE WARRANTLESS SEARCH OF THE BOX WAS PROPER

Petitioner, the People of the State of California, respectfully requests this Court grant this petition

for writ of certiorari to consider the fundamental question of whether a thief who steals an automobile has any right to privacy with regard to items inside the automobile and whether the thief may assert Fourth Amendment rights with regard to the property in the stolen automobile.

Initially, it is well settled police may stop and search an automobile without a search warrant when they have probable cause to believe the vehicle contains contraband or evidence of a crime. (Arkansas v. Sanders, supra, 442 U.S. 753, 760; Chambers v. Maroney (1970) 399 U.S. 42; Carroll v. United States (1925) 267 U.S. 132.) The reason for this rule is that the inherent mobility of automobiles often makes it impractical to obtain a warrant. (Arkansas v. Sanders, supra, at p. 761; Chambers v. Maroney, supra; Carroll v. United States, supra.) In addition, the configuration, use, and regulation of automobiles often dilute the reasonable expectation of privacy that exists with respect to differently situated property. (Arkansas v. Sanders, supra; South Dakota v. Opperman (1976) 428 U.S. 364, 368; Cardwell v. Lewis (1974) 417 U.S. 583, 590.)

However, in Arkansas v. Sanders, supra, this Court concluded the rules allowing warrantless searches of automobiles did not apply to items inside an automobile to which there was an expectation of privacy such as personal luggage. Consequently, if such items were found inside a vehicle, they could be seized, but a search warrant would be required before the items could be searched. (Arkansas v. Sanders, supra, at pp. 763-766.)

This Court also noted, however, that not all items inside a vehicle were entitled to such an expectation of privacy. Rather, a case by case determination would be required to determine which items may only be searched with a warrant. The only specific holding in Arkansas v. Sanders, supra, was that luggage carried an expectation of privacy and could only be opened and searched with a warrant whether or not it was inside a vehicle.

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before

> personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." (Arkansas v. Sanders, supra, at pp. 764-765, fn. 13.)

In the meantime, the California Supreme Court reached a similar conclusion. In People v. Minjares (1979) 24 Cal.3d 410, the California Supreme Court relied on the prior opinion of this Court in United States v. Chadwick (1977) 433 U.S. 1, and concluded once a closed container found in an automobile comes under the exclusive control of a police officer an immediate search was no longer necessary. Rather, a warrant had to be obtained for a search of the container unless exigent circumstances mandated an immediate search.3/

Based on this conclusion the court held a tote bag found in an automobile could not have been examined without a search warrant. The court also noted its holding was based on the federal constitution as it intimated "no views on how the validity of the search in this case would be decided under the California Constitution." (People v. Minjares, supra, at p. 424, fn. 8.)

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3. The Court denied a petition for writ of certiorari in the case. (California v. Minjares (1979) 443 U.S. 916.)

All these cases were employed by the California Supreme Court in People v. Dalton (1979) 24 Cal.3d 850. In Dalton, the California Supreme Court relied on Chadwick, Sanders and Minjares, and concluded a thief riding inside an automobile he had taken could assert a right to privacy as to closed items inside the automobile.4/ Accordingly, he could challenge and have a court invalidate a warrantless seizure of closed items inside the vehicle such as a box.

The essential facts in the instant case indicate officers stopped a car which was being operated in an erratic manner. Musante was the passenger and his wife was the driver. Prompt police investigation revealed the vehicle had been stolen and Musante was arrested. On the backseat the officers saw an electric blanket box. It had a top on it, but the top was not taped to the box. The box was opened and marijuana was located inside.

Under preexisting California law the search and seizure would have been proper as a thief could not procure the benefits of the Fourth Amendment and use them to shield him from a search of the box. (People v. Upton (1968) 257 Cal.App.2d 677, 682-684.) Nevertheless, because of the Dalton decision, the Court of Appeal was required to invalidate the search of the box in the car on the ground Musante, the man who had taken the

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4. A petition for writ of certiorari was denied in Dalton on March 24, 1980. ___ U.S. ___.

car, had a right to privacy as to the box inside the car. (See Auto Equity Sales, Inc. v. Superior Court (1962) 54 Cal.2d 450, 454-455 (decisions of the California Supreme Court are binding on all lower courts).)

Petitioner believes fundamental principals of constitutional law compel the conclusion a thief of a vehicle should not be able to assert a right to privacy as to closed items inside the vehicle the thief has taken. Accordingly, it is requested this petition for writ of certiorari be granted to reject such a result and to disapprove of any language in Dalton to the extent it intimates federal law grants a thief any legitimate expectation of privacy in closed items in a stolen vehicle.

The major problem with Dalton is that the California Supreme Court accepted the argument one who has stolen an automobile may assert a right to privacy in the items in the automobile. The rationale for his holding is that even if a thief has no expectation of privacy in the vehicle, he still would have an expectation of privacy in the closed items in the vehicle. The point being the issue is not the validity of the car search, but the validity of the search of the item in the vehicle. (People v. Dalton, supra, at pp. 858-859.)

However, the reasoning behind this conclusion is flawed because the interest of the thief in the vehicle cannot be separated from the interest of the thief in the items inside the vehicle.

It makes no sense to hold a thief has no right to privacy as to the stolen vehicle and then permit him to insulate evidence of a crime or instrumentalities of a crime from the police by placing them in closed items which were stolen along with the vehicle, or placed in the vehicle by the thief. A thief should have no legitimate expectation of privacy as to the vehicle or items inside the vehicle. Instead, a thief should know the inevitible capture of the car will entail a search to determine its ownership and an immediate inspection of any containers to determine ownership.

As Justice Gardner, of the California Court of Appeal observed in his concurring opinion below:

> "When someone is driving my stolen car, I think the police have a right to arrest him and to search him and all closed containers therein. I do not want that thief to have any of my Fourth Amendment rights. Of course, if the cops open a box and find my stash of marijuana, I have grounds to complain. But if they open the box and find the thief's stash he has no legal right to complain. He is not legally on the premises to be searched and has no standing to complain when the police open closed containers on those premises. But then, of course, Dalton says he has and that, to coin a phrase, is that.

> "None of this is meant to indicate that a burglar or a car thief loses his Fourth Amendment rights entirely. For example, he can only be patted down for weapons or destructive evidence. The skin search comes later -- during the booking process. It simply means he can't clothe himself in my Fourth Amendment rights -- which is exactly what the court did in Dalton although it denied doing it. I cannot see any logic in insisting on the issuance of a search warrant before the officers conduct an inventory of the contents of closed containers therein. I still think Upton was a good law." (People v. Musante (1980) 102 Cal.App.3d 156, 159-160.)

Support for our argument here may also be found in Rakas v. Illinois (1978) 439 U.S. 128. There passengers in a vehicle challenged a police search of a box in the glove compartment of the vehicle as well as seizure of a rifle. This Court rejected the notion the passengers could assert any Fourth Amendment claims as to the seizures noting the Fourth Amendment only protects those who can claim a legitimate expectation of privacy with regard to the invaded place. (Id., at pp. 141, 143-144, and fns. 9, 12.) Obviously, if the passengers of a vehicle had no legitimate Fourth Amendment rights with regard to the car, then Musante, who is a car

thief, is hardly in the position of being able to assert a legitimate expectation of privacy as to items in the victim's vehicle.

In addition, Musante cannot assert Rakas cannot be applied here as it is a rule of federal standing. Rakas defines what legitimate interests may constitutionally be protected by the Fourth Amendment, it is not a narrow decision concerning standing requirements. (Id., at p. 139.)

Moreover, Musante cannot claim Dalton and this case were only based on the California Constitution and are thus not affected by the Rakas decision. Dalton was based on the decisions of this Court in Sanders and Chadwick as well as Minjares, which, as noted earlier, was based on federal constitution. As Dalton purports to interpret rights granted under the federal Constitution, it is obviously subject to the limits of Fourth Amendment rights set forth in Rakas. (Oregon v. Hass (1975) 420 U.S. 714, 719.)

Moreover, Mincey v. Arizona (1978) 437 U.S. 385, does not assist respondent. In Mincey this Court held a defendant did not lose his Fourth Amendment rights in his own residence by having committed a murder there. The point of Mincey being commission of a crime does not deprive one of legitimate Fourth Amendment rights. However, unlike Mincey the defendants in Dalton and this case simply have no legitimate expectations of privacy to assert. They were

not the legitimate owners of the car involved or necessarily the contents of the vehicle.

United States v. Chadwick (1977) 433 U.S. 1, and Arkansas v. Sanders, supra, also do not compel a contrary result. These cases discuss the legitimate right to privacy of individuals in closed objects and indicate a warrant is required before such objects can be searched and seized. The crucial point here is that a thief of an automobile cannot assert any legitimate interest in the privacy of the articles contained therein.

Moreover, allowing a thief to assert a right to privacy in closed items in a stolen vehicle can only lead to public questioning of the reasonableness of our legal system. The exclusionary rule is designed to deter unlawful acts of law enforcement and to not make courts party to police illegalities. This is why illegally obtained evidence is suppressed despite the culpability of the accused. (Mapp v. Ohio (1961) 367 U.S. 643; People v. Cahan (1955) 44 Cal.2d 434.) In addition, the purpose of the exclusionary rule is the protection of an individual's legitimate right to privacy. Yet it seems questionable that the legal system should be in the business of granting a thief a right to privacy in items found in a stolen car. (People v. Solario (1977) 19 Cal.3d 760, Rakas v. Illinois, supra, at pp. 143-144, fn. 12.) While this fact may be lost on some, it is not lost on the public which, after all, the law is really designed to protect.

Moreover, it seems worth noting the exclusionary rule is not an end in itself. Rather, it is merely a means of protecting the rights of citizens from unreasonable invasions of their right to privacy in accord with the mandate of the United States Constitution. (Arkansas v. Sanders, supra, at p. 758.) However, a thief simply cannot assert police acted unreasonably by examining items in a stolen car. If he steals the car, he can hardly assert any rights as to the items in the stolen car. Moreover, if the items belong to the victim of the car thief, the victim can always assert his own right to privacy in the items. The thief of the car can hardly be permitted to steal the car and then claim the owner's rights to items in the car had been violated by police conduct.

It must also be noted that the idea of giving a thief a right to privacy as to items inside a car he has stolen seems contrary to the very basis of the Fourth Amendment which gives the people the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (Emphasis added.)

Furthermore, federal law indicates there is no right to privacy in a closed container such as a box. Both Chadwick and Sanders dealt with personal luggage to which an individual could have a reasonable expectation of privacy. There is no reason to assume, however, there is an expectation of privacy in an unsecured box lying in plain sight in the passenger area of a vehicle. (United

States v. Neumann (8th Cir. 1978) 585 F.2d 355, 360.) As was noted in Neumann, supra, at pages 360-361:

> "This court is of the opinion that the warrant requirement in Chadwick should not be extended to the facts of this case. There is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile. The arresting officers merely lifted the lid of the box and discovered a large quantity of pills. Unlike the situation in Stevie, where the officers could have seized and inventoried the locked suitcase as a unit without fear of loss or theft of the contents, here it was reasonable for the officers to promptly examine the contents of the box and later to have the drugs properly inventoried and secured. This procedure protected the legitimate interests of the arresting officers, including protection against unwarranted allegations of theft or loss, and could well have protected the interests of the Neumanns in having their property properly identified, safely kept and returned had not the box contained a controlled substance."

Accordingly, having obtained cause to seize and search the vehicle, the officers had the perfect right to conduct a warrantless search of the cardboard box to determine its contents.

It must also be noted the rule enunciated in Arkansas v. Sanders, was not espoused until 1979. Yet, the search in this case occurred during 1977. Accordingly, the officers acted in good faith in accord with the law existing at the time. Under these circumstances there is no reason to apply the rule espoused in Arkansas v. Sanders retroactively. Such an application will not deter future illegal conduct as the police did not act illegally here. Rather, they acted in accord with the law as it existed at the time. Moreover, prospective application of the Sanders case will not place the courts in the position of condoning any conduct that was illegal at the time it occurred. Thus, the conduct of the police should be upheld here on the ground the Sanders case should only be applied prospectively. (United States v. Peltier (1975) 422 U.S. 531.)

Finally, it would seem this case presents an excellent example as to why the exclusionary rule should be reconsidered. First, recent studies have not been conclusive as to whether the exclusionary rule has deterred police from unlawful conduct. (See Oakes, Studying the Exclusionary Rule in Search and Seizure (1970) 37 U. Chi. L.Rev.; see Stone v. Powell (1976) 428 U.S. 465, 492-493.)

Moreover, the concept of deterrence assumes most police conduct is deliberate. However, this is not always the case. An incorrect judgment may be due to the pressure of making a split-second decision in the field, an inability to foresee changes in the law as in this case, or to foretell the composition and disposition of a particular court. (See California v. Minjares (1979) 443 U.S. 916.)

In addition, it is often said the exclusionary rule is needed to foster respect for the court system by showing the public the courts do not condone illegal activity by law enforcement. (See Stone v. Powell, supra, at pp. 489-491.)

Yet, it is difficult to see how the results of this case in the state courts would foster public respect for the court system. A thief took the car of another person and was then able to assert a right to privacy as to items in that car. The victim of the theft never asserted any right to privacy as to the car or the items inside or complained of police conduct. Yet, the thief was permitted to do so to have a court invalidate a search which was proper at the time it was conducted and have his conviction reversed. Such an Alice in Wonderland result hardly fosters respect for the legal system.

Accordingly, it is requested certiorari be granted to determine whether the exclusionary rule can be applied in the manner it has been applied or whether it should be abolished or modified.

Consequently, it is apparent the instant case raises fundamental questions as to the application of the exclusionary rule to this case and the validity of the rule itself. Because the issues presented in this case are of fundamental importance to all persons in the United States, it is requested this petition for writ of certiorari be granted.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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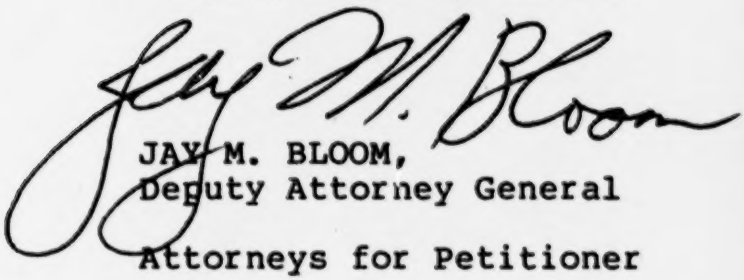

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# APPENDIX A

[Filed February 14, 1980]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-34522/VCR-432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant

APPEAL from the Superior Court of San Bernardino County. Donald R. Egan and Don A Turner, Judges. Affirmed in part; reversed in part.

Richard J. Weller, under appointment by the Court of Appeal, for Defendant and Appellant.

George Deukmejian, Attorney General, and Michael E. Lasater, Deputy Attorney General, for Plaintiff and Respondent.

Defendant pled guilty to burglary. Insofar as this court is concerned, he contends (1) that the trial court failed to advise him of the direct consequences of his guilty plea, and (2) that the degree of burglary was not specifically designated although he was sentenced for first degree burglary.

The lack of a certificate of probable cause precludes consideration of these contentions. We agree completely with the stand taken by the court in People v. Pinon, 96 Cal.App.3d 904 that if Penal Code § 1237.5 is to retain any viability in the statutory scheme, appellate courts cannot engage in a wholesale disregard of its procedural requirements. Judicial economy, the usual excuse for circumventing this section, is a sorry excuse for ignoring a statute which was enacted for that very consideration.

See insert on p A-1a

The judgment of conviction of burglary will be affirmed.

At the same time the defendant pled guilty to the burglary, he pled guilty to possession of marijuana for sale after an unsuccessful motion to suppress. We review the motion to suppress.

Stripped to their essentials the facts are really quite simple. Officers stopped a car which was being operated in an erratic manner. Defendant was the passenger; his wife the driver. Prompt investigation revealed that the car was stolen. Defendant and his wife

were arrested. On the back seat was a large box described as an electric blanket box. The box was opened and in it was a large amount of marijuana. It is the opening of this box which is the bone of contention.

At the time of this hearing, the issue seemed fairly clear. In People v. Upton, 257 Cal.App.2d 677, it was held that it was reasonable for officers to search a stolen car and in so doing to open suitcases or boxes found in that car for the purpose of ascertaining ownership or whether they contained any stolen material. (See Witkin, California Evidence 2d 1977, Supplement ¶ 120A.) Applying Upton to the facts of this case, when the officers found themselves in possession of a stolen car, it would appear reasonable for them to open the box which from its markings contained an electric blanket. It became necessary to ascertain either ownership of the blanket or whether it had been stolen.

Of course, Upton was decided before the current spate of footlocker/brief case/package/closed container cases. (United States v. Chadwick, 433 U.S. 1 [53 L.Ed.2d 538, 97 S.Ct. 2476]; Arkansas v. Sanders, ___ U.S. ___ [___ L.Ed.2d ___, 99 S.Ct. 2586]; People v. Minjares, 24 Cal.3d 410; People v. Dalton, 24 Cal.3d 850.) Upton might have had continued vitality under Chadwick, Sanders and Minjares. However, Dalton shot Upton down in flames. Under the circumstances almost identical to those in the instant case, the Supreme Court held that closed boxes or con-

tainers in a stolen vehicle cannot be opened without a search warrant. Under the compulsion of Dalton, we reverse the conviction of possession of marijuana for sale.

Affirmed in part; reversed in part.

CERTIFIED FOR PUBLICATION.

/s/ Gardner
P.J.

We concur:

/s/ Kaufman
J.

/s/ McDaniel
J.

Concurring opinion, Gardner, P.J.

People v. Dalton, 24 Cal.3d 850, which compelled a reversal in this case has a significant flaw. It is wrong.

I fully recognize that under the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below.

I have no quarrel with the principle that the Fourth Amendment protects closed personal effects as well as persons, houses and cars. After all, it is rather specific in protecting the rights of people to be secure in their "persons, houses, papers and effects." However, I think that if the authors of the Fourth Amendment were aware of Dalton, they would be turning over in their graves.

I do not accept the concept that a thief who steals my car thus wraps himself in the mantle of my Fourth Amendment rights. I do not quarrel with the concept that the Fourth Amendment protects people, not places. In our case, the lawful owner of the car would possess certain privacy rights concerning his vehicle and its contents which rights must receive the protection of the law. However, the owner possesses no person expectation of privacy as to contraband placed in his car by others after the

vehicle has been stolen. In order to apply the vicarious exclusionary rule to one in the defendant's position, it is first necessary to create a theoretical expectation of privacy in the vehicle owner as to the contraband of which he knows nothing and which found its way into his vehicle solely because the vehicle was stolen from him. I decline to accept the absurdity that the owner has any expectation of privacy in defendant's marijuana. I further contend that the thief had no expectation of privacy as to any package in the stolen vehicle.

Although Dalton denied that the vicarious exclusionary rule was applicable in this type of case, the court was in error. In Dalton, the court said at p. 859: "It is contended that appellant may not contest the search of the car under the vicarious exclusionary rule because no interest of the owner of the vehicle ws violated. (Citation.) Once again it should be pointed out that appellant is contesting the warrantless search of the boxes, not of the car. He never disclaimed any interest in the boxes. Thus, the search of the boxes does not involve the vicarious exclusionary rule. (Citations.)" This is pure sophistry. Conceptually, Dalton can't be upheld without resort to the vicarious exclusionary rule. And when that happens, the court comes slap dab up against Solario.

In People v. Solario, 19 Cal.3d 760, the court held that a burglar is not entitled to the protection of Penal Code

§ 844. It held that the vicarious exclusionary rule does not enure to the benefit of a burglar since the person whose rights were theoretically violated was the burglar's victim. The court made it clear that Penal Code § 844 offers protection to the householder, not to the burglar. As this court said in an earlier case, with perhaps a touch of hyperbole, a burglar cannot make another man's home his castle. (People v. Ortiz, 276 Cal.App.2d 1, 5.) Neither can a car thief make his victim's car his car for the purposes of the vicarious exclusionary rule. The concept was aptly put in the concurring opinion in People v. Shaw, 21 Cal.App.3d 710, 715, "To my mind it borders upon the absurd to hold that a thief should be given the benefit of a constitutional right to an expectation of privacy to a vehicle which he has stolen."

This is not to say that Fourth Amendment rights are available only to one who has clear title to property. That Amendment protects persons without title, e.g., one with a possessory interest or anyone legitimately on the premises or where the area is one to which there was a reasonable expectation of freedom from governmental intrusion. (Mancusi v. DeForte, 392 U.S. 364 [20 L.Ed.2d 1154, 88 S.Ct. 2120]; Jones v. United States, 362 U.S. 257 [4 L.Ed.2d 697, 80 S.Ct. 725]; United States v. Jeffers, 342 U.S. 48 [96 L.Ed. 59, 72 S.Ct. 93].)

The test for whether or not there has been an unreasonable governmen-

tal intrusion, of course, is whether the defendant had a reasonable expectation of privacy. (People v. Edwards, 71 Cal.2d 1096, 1100.) Aye, there is the rub. Unquestionably, a burglar has an overwhelming expectation of privacy. Actually, the entire criminal class, with the possible exception of flashers, operate entirely with a very real expectation of privacy. However, this is not a reasonable expectation which the courts will recognize or enforce. The criminal's right of privacy is always subject to reasonable governmental intrusion. Thus, to claim the protection of the Fourth Amendment, one must be legally and legitimately in the area about to be entered and searched. A simple example will suffice.

I was recently the victim of a burglary. A neighbor had seen the entry and, purely by accident, the police and I arrived at the same time and while the burglary was in full swing. The burglar, Billy Bell, a well known local professional, was apprehended under some bushes in the backyard. He was handcuffed and taken to the police car. The officers then returned to the bushes and in that area they found Billy's loot scattered around. But what if Billy had put his loot in a box, perhaps in a box with the label "Private property of Billy Bell, professional burglar. Keep out." Would the police have had to get a search warrant to open that box? To me the idea is downright silly. So, too, if a thief is caught in possession of a stolen car, why should he have any Fourth Amendment rights over closed containers in the car?

Perhaps thieves and burglars have different standards of protection. This, of course, presents some rather prickly equal protection problems. To me the idea of giving car thieves or burglars Fourth Amendment rights over closed containers in burgled houses or stolen cars is simply preposterous. Nevertheless, that is the result compelled by Dalton.

Dalton says that the officers were not certain that the defendant had stolen the car at the time the boxes were searched. Of course, they were not. Nevertheless, probable cause for an arrest existed. If we have to wait for convictions before officers can act, the efforts to police officers to protect the law-abiding public are going to be somewhat curtailed. When someone steals my car and I report it to the police, I think they have probable cause to arrest the driver and I don't think that a lack of a conviction has anything to do with the case. Actually, the odds are almost prohibitive that the driver is the thief. Of course, the insidious Dr. Fu Manchu might have stolen it, then, disguised as Honest John, used car salesman, sold it to the innocent driver. (To avoid a charge of racism, I will have Charley Chan arrest Dr. Fu Manchu.) But all of this has nothing to do with probable cause. When someone is driving my stolen car, I think the police have a right to arrest him and to search him and all closed containers therein. I do not want that thief to have any of my Fourth Amendment rights. Of course, if the cops open a box and find my stash of marijuana, I have grounds to complain. But if they

open the box and find the thief's stash he has no legal right to complain. He is not legally on the premises to be searched and has no standing to complain when the police open closed containers on those premises. But then, of course, Dalton says he has and that, to coin a phrase, is that.

None of this is meant to indicate that a burglar or a car thief loses his Fourth Amendment rights entirely. For example, he can only be patted down for weapons or destructive evidence. The skin search comes later -- during the booking process. It simply means that he can't clothe himself in my Fourth Amendment rights -- which is exactly what the court did in Dalton although it denied doing it. I cannot see any logic in insisting on the issuance of a search warrant before the officers conduct an inventory of the contents of closed containers therein. I still think Upton was good law.

When, in Cahan, the Supreme Court of this state adopted the exclusionary rule, it made a commitment that the courts would develop "workable rules" and not indulge in "needless refinements and distinctions" nor "introduce confusion into the laws of criminal procedure." (People v. Cahan, 44 Cal.2d 434, 3450.) That commitment was not only commendable, it was necessary. Police officers in the field making minute to minute and second to second decisions must have rules which are definite, simple, plain, explicit and understandable. Nevertheless, as I sur-

vey the 400 to 500 cases collected in Mr. Bell's splendid Compendium on Search and Seizure, I cannot but observe that the rules which have evolved constitute a kind of encrusted ritual of rigid etiquette which is almost Byzantine in its frozen formality and labyrinthine protocol. Dalton simply adds, erroneously I submit, to this ever thickening layer of legalisms and adds one more barren technicality to this already bloated and amorphous field.

I don't know how many car thieves are apprehended each year, but in each case any police officer worth his salt is going to conduct an inventory to ascertain the ownership and status of the contents of the car because car thieves are notoriously catholic in their thefts. In so doing, it will be necessary to open closed containers to ascertain ownership and whether they contain stolen goods. Under Dalton, they will have to secure a search warrant for this task. This simply imposes on the already heavy workload of prosecutors and judges a completely unnecessary burden because I can't for the life of me imagine any judge turning down such a request. So where has anyone benefited from this "needless refinement" to the exclusionary rule?

CERTIFIED FOR PUBLICATION.

/s/ Gardner
P.J.

[Filed March 11, 1980]

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-34522/VCR-432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant.

The opinion in the above case, filed February 14, 1980, is modified by the insertion of the following paragraph on page 2, following the first paragraph which concludes with the words ". . . was enacted for that very consideration."

The inserted paragraph is as follows:

"However, just to avoid an inevitable collateral attack on the basis of inadequacy of counsel for not securing a certificate of probable cause, we would observe that the defendant's contentions insofar as the burglary charge are without merit. This was a plea bargain. The defendant was advised of the direct consequences of his guilty plea and that advisement made it clear that he was pleading guilty to first degree burglary. The advisement was that he was to receive a 2, 3 or 4 year state prison term. That is the penalty attached to first degree burglary. Second degree burglary is punishable by either county jail or state prison (Penal Code § 461). The state prison term for second degree burglary is 16 months or 2 or 3 years (Penal Code § 18). Therefore, no question can arise as to the fact that defendant pled guilty to first degree burglary with the possible penalty specified. Thus, defendant's contentions if considered in spite of the failure to secure a certificate of probable cause would be held to be meritless."

With this modification, the petition for rehearing is denied.

/s/ Gardner
P.J.

I concur:

/s/ McDaniel
J.

[Filed March 12, 1980]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-432 (VIC))

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant.

THE COURT:

Due to a clerical error, the Modification of Opinion on Denial of Rehearing, filed March 11, 1980, was stamped, 'Not To Be Published In Official Reports', and should have been stamped, 'Certified For Publication'.

Gardner, P.J.
Presiding Justice

# APPENDIX B

CLERK'S OFFICE, SUPREME COURT
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*I have this day filed Order*

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NJ.
Francisco 4-24
Dom Fund
Date Rec'd
HEARING DENIED

*In re:* 4/cr. *No.* 10041
People

*vs.*

Musante

*Respectfully,*

G. E. BISHEL
*Clerk*

88888-877 11-76 4M OSP

# APPENDIX C

[Filed May 19, 1980]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(County No. VCR 432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant

THE COURT:

The request by respondent, Attorney General, to recall and Stay Remittitur, is DENIED.

Gardner, P.J.
Presiding Justice